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No. 02-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

WEST 41ST STREET REALTY LLC, EMM REALTY CORP., and TIMES SQUARE GARAGE, LTD.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, 42ND ST. DEVELOPMENT PROJECT, INC., 632 EIGHTH AVENUE ASSOCIATES, LLC, ROMACK REALTY CORP., and THREE O REALTY LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. May the respondents, consistently with the Due Process and Takings Clauses of the United States Constitution, use the eradication of "blight" as the purported public purpose for condemning the petitioners' property and giving it to another private party to develop, when the petitioners wish to develop their own property, and any residual "blight" is the result of the respondents' own actions in preventing the petitioners from developing their property?

2. Do the respondents' actions in preventing the development of the petitioners' property for more than two decades, followed by their attempt to use the undeveloped condition of the property as the basis for turning it over to another private party to develop, violate the petitioners' rights under the Due Process and Takings Clauses of the United States Constitution?

Statement Pursuant to Supreme Court Rule 29.6

Petitioners West 41st Street Realty LLC, EMM Realty Corp., and Times Square Garage, Ltd. are privately-owned entities. They have no parent corporations, and there is no publicly held company that owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The order of the Court of Appeals of the State of New York, dated September 12, 2002, dismissing the petitioners' appeal from the decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, is not officially reported, and is reproduced in Appendix A (1a-2a).

The decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 20, 2002, is reported at 298 A.D.2d 1, 744 N.Y.S.2d 121, and is reproduced in Appendix B (3a-11a).

Jurisdiction

The order of the Court of Appeals of the State of New York sought to be reviewed was entered on September 12, 2002. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1, because it is being filed within 90 days of the entry of the order sought to be reviewed. This Court has jurisdiction to review the order of the New York State Court of Appeals pursuant to 28 U.S.C. § 1257(a). Because 28 U.S.C. § 2403(b) may apply, the Attorney General of the State of New York is being served with a copy of this petition pursuant to Supreme Court Rule 29.4(c).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution reads in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution reads in pertinent part as follows:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case

A. The Times Square Redevelopment Project

The Times Square Redevelopment Project is a long-running project of The City of New York (the "City") and the respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("UDC") to redevelop the Times Square area of Manhattan (R. 71).[1]

The Times Square Redevelopment Project was initiated by a Memorandum of Understanding dated June 27, 1980 between the UDC and the City (R. 86-89). The Memorandum of Understanding stated that the Times Square area, loosely defined as the area "in the vicinity of 42nd Street and 7th and 8th Avenues," was "marked by street crime, substandard and insanitary conditions, undesirable uses and physical and social blight," warranting "public action to cause the replanning, clearance, reconstruction, redevelopment and rehabilitation of the Project Area" (R. 86).

The UDC and the City divided the Project area into twelve numbered "sites" (R. 94). Site 8 South, which is the subject of this case, comprises the property across the street from the Port Authority Bus Terminal, bordered by 41st Street on the north, 40th Street on the south, and Eighth Avenue on the west, and extending east of Eighth Avenue approximately one-half block (R. 71; *see* R. 136).

On or about October 4, 1984, the UDC made its initial determination and findings approving the Project and authorizing the UDC to acquire, by condemnation if necessary, any real property within the Project area (R. 90-143). The central focus of the Project, as described in the 1984 determination and

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[1] "R." citations are to the printed Record in the Supreme Court of the State of New York, Appellate Division, First Department.

findings, was the construction of new office buildings on Broadway and Seventh Avenue abutting Times Square, and the reconstruction of the theaters located on the north and south sides of the midblock of 42nd Street between Broadway and Eighth Avenue (R. 94-96). With respect to Site 8 (consisting of Site 8 South and Site 8 North, a smaller tract located on the east side of Eighth Avenue between 41st and 42nd Streets), the 1984 determination and findings envisioned the construction of a merchandise mart linked to the Port Authority Bus Terminal by a pedestrian bridge across Eighth Avenue (R. 95, 99, 136).

The UDC's 1984 determination and findings were upheld by the courts. *See Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986). *See also Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 45-46 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). In upholding the 1984 determination and findings, the courts approved the UDC's finding that the Times Square Redevelopment Project as a whole served a public purpose, although they did not address the issue of whether or not there was a public purpose for the merchandise mart proposed for Site 8. *See Jackson v. New York State Urban Dev. Corp., supra*, 67 N.Y.2d at 424-25, 494 N.E.2d at 440-41, 503 N.Y.S.2d at 309-10.

On or about April 18, 1990, the UDC took title by condemnation to nine of the 13 acres within the Project area, including four office building sites, eight theaters, and three other midblock parcels (R. 72, 144). The UDC did not, however, take title to any portion of Site 8 (R. 72). Indeed, the merchandise mart which the 1984 determination and findings proposed for Site 8 was never built.

On or about January 27, 1994, the UDC issued a new determination and findings confirming and updating its 1984 determination and findings (R. 144-162). The 1994 determina-

tion and findings no longer proposed to proceed with the construction of a merchandise mart on Site 8. The 1994 determination and findings did not make a definitive finding with respect to the ultimate use of Site 8 South. Indeed, they did not even make a finding that Site 8 South would necessarily be taken as part of the Times Square Redevelopment Project at all. Instead, they listed a number of possible alternatives for Site 8 South, including:

> (1) A "wholesale mart/office building" with bridges over Eighth Avenue and 41st Street (R. 146, 159); or
>
> (2) Two or more "residential buildings" aggregating approximately 1.0 million square feet and housing about 1,700 to 2,000 residents (R. 159); or
>
> (3) Letting the Times Square Redevelopment Project expire in 2015 without taking and developing Site 8 South at all (R. 159, 160).

While the respondents were thus keeping the fate of Site 8 South in suspense, positive changes in the New York real estate market in general, and in the Times Square area in particular, made the "blight" that the respondents had previously found to exist in the Times Square area in 1984 a thing of the past. As stated by *The New York Times*, "[b]lighted is not a word that anyone would use to describe Times Square today . . . ." Charles V. Bagli, *Companies Get Second Helping of Tax Breaks*, The New York Times, Oct. 17, 1997, p. A1, col. 5, p. B2, col. 1. These developments have removed any possible question as to the willingness of developers to develop Site 8 South without any assistance from government (*see, e.g.*, R. 182-185, 273, 274, 277-278, 299-300).[2]

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[2] The attractiveness of Site 8 South for development is confirmed by the fact that Site 8 North, just across the street from Site 8 South, has recently been purchased by a Milstein family entity for almost three times

The respondents implicitly acknowledged the significance of these positive changes by admitting publicly in 1994 that it might not be necessary for them to take Site 8 South at all (R. 159, 160). Nevertheless, as described below, the respondents refused to permit the petitioners and other landowners in Site 8 South to develop their property, despite repeated attempts on their part to do so.

B. Respondents' Refusal to Permit the Owners to Develop Site 8 South

From the inception of the Times Square Redevelopment Project in 1980, the pendency of the Project, and the UDC's announced intention to take Site 8 South by condemnation, have prevented petitioners and the other landowners in Site 8 South from developing their properties (R. 72). In the face of the looming prospect of condemnation, it is impossible to arrange the financing and the long-term tenant commitments necessary for a major office building development (R. 272, 277). This interference with petitioners' ability to develop their properties continued unabated after 1994, despite the UDC's public admission in 1994 that it might in the end never seek to acquire Site 8 South at all (R. 72-73).

In an effort to regain the ability to develop their properties, 250 West 41st Street Corp., a former owner of the lot later owned by petitioner West 41st Street Realty LLC, and petitioner Times Square Garage, Ltd. commenced an action on statutory grounds against the UDC and others in the Supreme Court, New York County (R. 73). *250 West 41st Street Realty Corp., et al. v. New York State Urban Development Corporation, et al.*, Index No. 112828/97 (R. 163-181). The UDC and the other defendants, far from agreeing to permit the landown-

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the price per square foot that the Times has agreed to pay for Site 8 South (R. 298-299, 318, 413-414, 767).

ers of Site 8 South to develop their properties, vigorously defended the action (R. 73). The action eventually resulted in a determination that the UDC retained the statutory right to condemn Site 8 South. *250 West 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, 277 A.D.2d 47, 715 N.Y.S.2d 407 (1st Dep't 2000), *leave to appeal denied*, 96 N.Y.2d 705, 746 N.E.2d 187, 723 N.Y.S.2d 132 (2001).

In early 1999 Gary Barnett, the Managing Member of petitioner West 41st Street Realty LLC, on behalf of petitioners and other owners of the majority of the square footage included in Site 8 South, contacted UDC and expressed interest in developing the Site on terms which would include the payment of fair market value for the Site (R. 74). Mr. Barnett confirmed this offer in a letter dated March 5, 1999 (R. 182-185), in which he described the capabilities of the developer of which he is President, Intell Management and Investment Company:

> "Intell Management and Investment Company is a national organization which has owned, managed and developed nearly 8 million square feet of office, retail and residential projects located throughout the United States. We are also presently developing the Planet Hollywood Hotel in Times Square, a 50 story, 500 room hotel and retail project on Broadway and 46th Street. We are building the Planet Hollywood project without any tax incentives from the City or State." (R. 185.)

By a letter dated March 17, 1999, 42DP rejected this offer (R. 186). This letter stated that "the State and the City's current thinking is to engage in a competitive process to select the developer" (*id.*).

C. Respondents' Decision to Condemn Site 8 South for the Benefit of the New York Times

Contrary to its previously stated intention of engaging in a competitive process to select a developer for Site 8 South, the UDC in October 1999 commenced unilateral negotiations with the New York Times (the "Times") regarding the possibility of relocating the headquarters of the Times from West 43rd Street to Site 8 South (R. 74). After its negotiations with the New York Times became known, the UDC refused to permit other interested developers to participate in those negotiations or to submit alternative proposals (R. 75).

In June 2000, the UDC and 42DP entered into a Memorandum of Understanding with the Times and its chosen developer, Forest City Ratner Companies, pursuant to which the UDC would acquire Site 8 South by exercising its power of eminent domain and (through 42DP) would lease the Site to the Times and Ratner, which would construct an office building on the Site having an announced square footage of approximately 1,370,000 square feet (R. 75).

On September 4, 2001, the UDC and 42DP issued a notice of a hearing with respect to the proposed acquisition and development of Site 8 South (R. 187-194). In the notice, the UDC and 42DP stated in a single conclusory sentence that the proposed condemnation would serve a public use, which the notice stated was "to continue and reinforce the revitalization of the area, to promote economic and social benefits to the City of New York, and to restore a blighted, deteriorated, substandard, insanitary and underutilized site to full productive use" (R. 193). The notice failed to disclose that any remaining "blight" in Site 8 South would already have been removed by the development of the Site if the respondents had simply allowed the owners of Site 8 South to develop their properties (R. 75-78).

On September 24, 2001, the UDC and 42DP held a public hearing on the proposed condemnation of Site 8 South (R. 195-316). Each of the petitioners appeared at the public hearing in opposition to the proposed condemnation (R. 76). Among other things, the petitioners drew the attention of the UDC and 42DP to the lengthy and unconstitutional suspension of the petitioners' right to develop their property, and to the absence of any factual basis for a finding of public use (*id.*).

For example, Gary Barnett, the Managing Member of petitioner West 41st Street Realty LLC and the President of Intell Management and Investment Company, stated at the hearing:

> "In terms of the process, for nearly twenty years the UDC has kept the land in Site 8 South on hold. No developer has been able to develop and no property owner has been able to develop their property because of the cloud that they've kept on it.
>
> "No compensation has been paid to any of the property owners so far.
>
> "And, in fact, UDC has said they could keep it another ten years and perhaps not even take it at the end of the day.
>
> "Any law that permits this kind of conduct on the part of a government agency is unconstitutional and we believe that the UDC should not be able to rely on an unconstitutional law to take Intell's property now.
>
> "In terms of the public purpose of these proceedings and of the condemnation, we certainly feel very strongly – Intell has plans to develop the property, and this property would already have been developed without the UDC. It's a canard to think that the only way this property would get developed is if UDC

takes it." (R. 272-273.)

Samuel Brach, the President of petitioner Times Square Garage Ltd., spoke to the same effect:

> ". . . . I approached the czar through UDC, Mr. Gargano. I presented him a plan. I arranged to have a developer, presented him a plan and asked him what he would likely okay the plan to develop.
>
> "He told me he would let me know.
>
> "And that happened about three years ago. Never happened.
>
> "Because I'm not New York Times. . . .
>
> "I ask the Board to reject this because it is not fair, it's not right, it's unconstitutional, because after all we bought it before and we should have the right to choose a developer to develop the property." (R. 274-275.)

Similarly, Robert C. Lapin, the President of petitioner EMM Realty Corp., stated:

> "Since 1984, my property has been in limbo. On one hand, I could never develop it because UDC could have condemned it at any time. But on the other hand, the UDC refused to formally condemn it and pay me for the property.
>
> "For seventeen years then I have been without compensation for the many opportunities I have lost to develop my land.
>
> "If the plan goes forward, the UDC will be rewarded for tying up Site 8 South for nearly twenty years without paying anyone for all of the opportunities lost.

> "Any law that allows property to be frozen for this long is unfair and, I believe, unconstitutional. The State should not permit this plan to go forward." (R. 298.)
>
> "Just walk around this area and you will find that the blight, unsanitary and underutilized area no longer is a factor to consider under the label of public use.
>
> "In all regards, this is a gigantic giveaway of the public's funds and private property to The New York Times and Forest City Ratner.
>
> "If both of these entities want this property, they should negotiate in the democratic way with the owners." (R. 299-300.)

On or about November 30, 2001, more than two months after the hearing was concluded, the UDC issued the determination and findings which are under review herein (R. 317-326).

In its determination and findings, the UDC did not contradict in any way the facts stated by the petitioners at the public hearing (R. 78). In particular, the UDC did not deny that for more than two decades it has made it impossible for petitioners and the other landowners in Site 8 South to develop their properties (*see id.*). Nor did the UDC deny that any residual "blight" in Site 8 South would have been eradicated by the development of the property if the UDC had simply permitted such development to proceed (*see id.*).

In the determination and findings, the UDC did not retract the admission in the September 4, 2001 notice of public hearing that "significant strides have been made in eliminating the blighted conditions in the Times Square area" (R. 193; *see* R. 319). However, the UDC reiterated the conclusory finding in the September 4, 2001 public notice that the proposed condem-

nation of Site 8 South was necessary to remove "blight" in the Site (R. 319).

D. The Decisions Below

Pursuant to Section 207 of the New York State Eminent Domain Procedure Law ("EDPL"), the petitioners sought review of the UDC's determination and findings by filing an original petition for review in the Supreme Court of the State of New York, Appellate Division, First Department (R. 65-85). The petition set forth the constitutional claims which are presented herein, and expressly relied upon the Fifth and Fourteenth Amendments to the United States Constitution, as well as upon the corresponding provisions of the New York State Constitution (12a-13a).[3]

By an order dated February 19, 2002, the Appellate Division stayed the UDC's determination and findings pending the hearing and determination of the petition.

In a decision and order dated June 20, 2002, the Appellate Division confirmed the UDC's determination and findings (3a-11a). The Appellate Division acknowledged that the "[p]etitioners argue that the proposed taking should be barred because the benefit inures to a private party, viz. the New York Times" (6a). The court stated that "our review on this point is limited to ascertain whether the project is rationally related to a conceivable public purpose" (9a), and upheld the proposed condemnation under this highly deferential standard of review as a means of eliminating "blight" (10a).

The Appellate Division also acknowledged that the petitioners had argued that the proposed taking was "in violation of due

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[3] Pursuant to Supreme Court Rule 14.1(g)(1), the First and Second Claims of petitioners' original petition for review in the Appellate Division are reproduced in Appendix C (12a-13a).

process protections of the state and federal constitutions on the ground that the UDC itself created any 'blight' which justifies condemnation since the UDC made it impossible for the owners to reap the value of their land during the last twenty years" (6a). Ignoring the uncontradicted evidence before it (*see* pp. 6-7, 9, 10 *supra*), the court stated that the record was "devoid" of evidence that the UDC had prevented the owners from developing their property (10a-11a).

The petitioners appealed as of right on constitutional grounds to the New York State Court of Appeals. On September 12, 2002, the Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (2a).[4]

REASONS FOR GRANTING THE WRIT

POINT I

The Taking Is Unconstitutional Because It Is Being Carried Out for the Private Purpose of Substituting One Private Developer for Another, Not for the Purported Public Purpose of Eliminating "Blight"

It is a fundamental principle of federal constitutional law that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though just compensation be paid." *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (Brandeis, *J.*) (citations omitted). *See also, e.g., Chicago, St. P., M. & O. Ry. v. Holmberg*, 282 U.S. 162, 167 (1930) (Stone, *J.*); U.S. Const. Amdt. 5 ("[N]or shall private property be taken for public use, without just compensation."). The question of whether the

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[4] On August 19, 2002, the taking was consummated. This does not moot the present proceeding, however, because the taking can and will be annulled if this Court should hold it to be unconstitutional.

requisite public use exists is one which the courts – and not the condemning agency – must ultimately decide. *See, e.g., Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705 (1923).

Here the purported public use is the elimination of "blight" through the development of the property. While this Court has held that the elimination of blight through urban redevelopment may constitute a public purpose which justifies a taking, *see Berman v. Parker*, 348 U.S. 26, 32-36 (1954), the critical distinguishing fact in the present case is that *the owners themselves wish to develop their own property, but have been prevented from doing so by the respondents.*

Where this is true, the elimination of "blight" *per se* can no longer constitute the public purpose required to justify the taking under the Constitution. Since the property will be developed under either scenario, thereby eliminating any remaining "blight," it is not enough merely to say that the elimination of "blight" is in the public interest. This is particularly true where, as here, the uncontradicted record evidence is that there is a "thriving real estate market" in the Project area (R. 406), and that any remaining "blight" would already have been eliminated by the owners themselves if the respondents had only permitted them to develop their own property (*see* pp. 6-7, 9, 10 *supra*). In this connection, the issue is not whether there was "blight" more than 20 years ago when the Times Square Project was first begun; the issue is whether there is "blight" that prevents private development of the property today.

The real public purpose issue in this case is not the elimination of "blight." Rather, the real public purpose issue in this case is whether or not it is a constitutionally sufficient public purpose for the state to take property from a private owner who wishes to develop it in order to give it to another private party who also wishes to develop it.

There is a clear conflict among the lower courts on this issue. In this case, the courts below have answered this question in the affirmative. Other recent decisions have answered the same question in the negative. *See, e.g., 99 Cents Only Stores, Inc. v. Lancaster Redevelopment Agency*, No. CV 00-07572, 2001 WL 811056, at *4-*5 (C.D. Cal. 2001) (striking down the proposed taking of one retailer's property to satisfy the private expansion demands of another retailer), *appeal docketed*, No. 0156338 (9th Cir. Aug. 10, 2001); *Southwestern Illinois Development Auth. v. National City Environmental, L.L.C.*, 199 Ill. 2d 225, 235-42, 768 N.E.2d 1, 7-11 (condemnation of private property to be conveyed to a private corporation to expand its parking lot was not for a primarily public use), *cert. denied*, 123 S. Ct. 88 (2002); *Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708, 711-12 (Ky. 1990) (taking of property to benefit another private party is invalid); *Tolksdorf v. Griffith*, 464 Mich. 1, 11, 626 N.W.2d 163, 169 (2001) (taking of property for a private road was not for a public purpose).

The importance of this question is difficult to overstate. In any case where the owner of property proposes to develop it, the argument can be made that by that very fact the owner has admitted that the property is "blighted," at least in the sense that it is not yet being used for its highest and best use. If this fact alone is enough to authorize the state to step in and take the property for the benefit of another private developer, then the result will be that the state will be authorized to designate its own preferred developer for any property whose owner has proposed to develop it. Such a sweeping assertion of the power to take private property from one person in order to give it to another cannot be reconciled with the command of the Constitution that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though just compensation be paid." *Thompson*

v. Consolidated Gas Utils. Corp., supra, 300 U.S. at 80.

This Court has never decided the question whether a claim of "blight" is sufficient to entitle a state to take private property from its owner who wishes to develop it and to give the property to another private person to develop instead. No such question was presented in *Berman v. Parker*, *supra*, and no such question was presented in any other case decided by this Court. This Court should grant certiorari in order to resolve this important question.

Any breach in the constitutional wall of prohibition against the taking of private property for private purposes creates the danger that politically influential entities will be able to enlist the cooperation of the state to take the property of others for their own private ends. This danger is well illustrated by the present case, in which one of the world's wealthiest and most influential newspapers has persuaded the respondents to expropriate the property of the petitioners for its new world headquarters. This Court should reaffirm that this is not a constitutionally permitted use of the condemnation power.

POINT II

The Proposed Taking Is Unconstitutional Because It Is Based Upon Respondents' Unconstitutional Decades-Long Prevention of the Development of Site 8 South.

The Due Process Clause, as well as the Takings Clause, of the United States Constitution applies to all proposed condemnation proceedings. *See, e.g., In re Tuthill*, 163 N.Y. 133, 143-44, 57 N.E. 303, 306-07 (1900) (Gray, *J.*).

It is a violation of due process for a state to prevent the owners of private property from developing their property for an indefinite period. *See, e.g., Jensen v. City of New York*, 42 N.Y.2d 1079, 1080-81, 369 N.E.2d 1179, 1179-80, 399 N.Y.S.2d 645, 646-47 (1977) (depriving a property owner of

the use of her property for an indefinite period constitutes a deprivation of property without due process of law); *St. Morris Assocs. v. McMorran*, 35 A.D.2d 997, 998, 318 N.Y.S.2d 121, 123 (2d Dep't 1970) ("The rights of a property owner to the lawful use of his property may not be indefinitely deferred upon the ground that the property might, at some future time, be required for public use. [Citations omitted.]").

In the present case, the respondents have prevented the petitioners from developing Site 8 South for more than two decades (*see* pp. 6-7, 9, 10 *supra*). The respondents' threat of condemnation alone was sufficient to prevent the development of the property, because it made it impossible to secure the financing and tenant commitments necessary for a major office building development (*see* p. 6 *supra*). But the respondents did not rely solely on the overhanging threat of condemnation to prevent the development of Site 8 South; they also took active measures to make sure that the Site could not be developed. Among other things, the respondents litigated state-law statutory issues all the way to the New York Court of Appeals in order to maintain their control over the Site (*see* pp. 6-7 *supra*), and rebuffed a formal offer by the landowners of Site 8 South to develop the Site at no cost to the State or City (*see* p. 7 *supra*). The respondents did all this despite the fact that they had no specific plans for the development of Site 8 South, and despite the fact that they had admitted publicly in 1994 that they might never decide to take Site 8 South at all (*see* pp. 5-7 *supra*).

In light of the foregoing facts – which are undisputed in the record – it cannot be seriously questioned that the respondents' decades-long prevention of the development of Site 8 South was and is a violation of the due process of law which is safeguarded by the United States Constitution. *See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 996-97 (1st Cir. 1983) (reviewing authorities, and holding that a 14-

year cloud of condemnation "exceeds every available indication of what the duration of a reasonable and constitutional freeze might be" (footnote omitted)).

The Appellate Division implicitly recognized that the indefinite prevention of development violates due process of law, but it sought to avoid the application of this principle by saying that the record was "devoid of evidence" that the petitioners were prevented from developing their property (10a-11a). But the unrebutted and uncontradicted evidence in the record was that the threat of condemnation made it impossible for the owners to secure the financing and the long-term tenant commitments necessary for a major development of this kind (R. 183, 272, 277).

Thus the record compels the conclusion that the petitioners have been unconstitutionally prevented by the respondents from developing their property. This, in turn, further confirms that the proposed condemnation of Site 8 South is unconstitutional, because the respondents' purported justification for the proposed condemnation – the alleged persistence of "blight" on the Site – is a direct result of the respondents' own unconstitutional prevention of the development of the Site. Therefore, to permit the respondents to use this pretext to condemn Site 8 South at this time would be to permit them to profit from a situation which has been created by their own unconstitutional acts.

To permit this would be to violate a fundamental principle of justice. As Judge (later Justice) Cardozo wrote in *People v. Schmidt*, 216 N.Y. 324, 341, 110 N.E. 945, 950 (1915):

> "The principle is fundamental that no man shall be permitted to profit by his own wrong. It enters, by implication, into all contracts and all laws. [Citation omitted] . . . ."

See also, e.g., Riggs v. Palmer, 115 N.Y. 506, 511-12, 22 N.E.

188, 190 (1889).

Thus, even if the respondents would otherwise be constitutionally entitled to condemn Site 8 South for the benefit of the New York Times under the pretext of eliminating "blight," the condemnation would violate the owners' constitutional rights because any remaining "blight" on the Site is the direct result of the respondents' unconstitutional course of action in preventing the petitioners from developing their property for a period of more than two decades.

CONCLUSION

For the reasons set forth above, the Court should grant a writ of certiorari to review the order of the Court of Appeals of the State of New York, dated September 12, 2002, dismissing the petitioners' appeal from the decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, dated June 20, 2002.

Dated: New York, New York
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Respectfully submitted,

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